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# Supreme Court of the United States

OCTOBER TERM, 1939

NO. 123

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HARRIET K. MOON, *Petitioner*,

VS.

HOME LIFE INSURANCE COMPANY OF NEW YORK, a corporation, *Respondent*.

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## PETITION FOR WRIT OF CERTIORARI AND BRIEF OF PETITIONER

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# Supreme Court of the United States

OCTOBER TERM, 1939

NO.....

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HARRIET K. MOON, *Petitioner,*

VS.

HOME LIFE INSURANCE COMPANY OF NEW YORK, a corporation, *Respondent.*

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Harriet K. Moon, respectfully asks this Court to review, on writ of certiorari, that certain judgment of the United States Circuit Court of Appeals for the Fourth Circuit in the case of Home Life Insurance Company of New York, a corporation, Appellant, vs. Harriet K. Moon, Appellee, rendered on March 12, 1940 (Tr. p. 256), a petition for rehearing therein having been filed (Tr. p. 257) and a rehearing denied by said Court by order entered on the 11th day of April, 1940 (Tr. p. 263), all of which will more fully and at large appear by reference to a true copy of the record in said cases, properly certified, herewith filed as a part hereof.

## I.

## SUMMARY STATEMENT OF THE MATTERS INVOLVED

Harriet K. Moon, the petitioner, instituted her action against the above-named Home Life Insurance Company of New York, a corporation, in the Circuit Court of Cabell County, West Virginia, a State court (Tr. p. 246), to recover upon two certain insurance policy contracts for accidental death benefits, each contract in which she was named as beneficiary, calling for the sum of $5,000.00, because of the accidental death of Charles C. Moon, the insured, whose death occurred July 11, 1938 (Tr. p. 1), the said insurance policies having been applied for within, countersigned, and delivered to the insured while he was a resident of, the State of West Virginia, and in which State he resided at the time of his death (Tr. p. 7, 17, and 19 to 34 both inclusive). This suit was removed by the said Insurance Company, defendant, to the District Court of the United States for the Southern District of West Virginia upon the ground of diversity as to Citizenship (Tr. p. 246), the plaintiff being a resident of the State of West Virginia (Tr. p. 7), where it was tried to a jury. (Tr. p. 11.)

For the reason that the facts in this case were identical with the facts in the case of Harriet K. Moon v. Mutual Benefit Health & Accident Association, a corporation, also instituted upon an insurance policy contract in the state court aforesaid and likewise removed to the same District Court, the sole question of liability upon said policies being whether or not the insured, Charles C. Moon, came to his death solely from bodily injury caused by accident, or whether the said Charles C. Moon came to his death as the result of self-destruction (Tr. p. 4), (the other defenses in said answer being later withdrawn by stipulation, Tr. p. 246) the District Court, by consent of the

parties, directed the said causes to be tried together (Tr. p. 41) and by reason thereof the transcript of the evidence filed in this case is also a transcript of the evidence filed in the case of Mutual Benefit Health & Accident Association.

At the conclusion of the plaintiff's testimony, defendant moved for a directed verdict, which motion the Court overruled (Tr. p. 163), and thereafter, at the conclusion of all the testimony, the defendant again moved the Court for an instructed verdict upon the same grounds assigned in motion at conclusion of plaintiff's testimony, which motion was again overruled by the Court. (Tr. p. 230.)

The jury found a verdict in favor of this petitioner for Ten Thousand Dollars ($10,000), the face of the two policies, and the defendant moved to set aside the said verdict and grant it a new trial (Tr. p. 12), which motion the Court over-ruled and judgment was thereupon entered by said District Court on July 6, 1939, in favor of this petitioner, against the said Home Life Insurance Company of New York, a corporation, for the said sum of Ten Thousand Dollars ($10,000) and costs. (Tr. p. 13.)

From this judgment the Home Life Insurance Company of New York, a corporation, defendant below, appealed to the United States Circuit Court of Appeals for the Fourth Judicial Circuit (Tr. p. 14), which court, after a hearing (Tr. p. 247) on March 12, 1940, rendered its opinion (Tr. p. 248) and entered its order (Tr. p. 256) setting aside the judgment of the District Court so entered as aforesaid, and remanded the said cause to the District Court with directions to enter judgment in favor of the defendant below, the said Home Life Insurance Company.

Thereafter, and within the time provided by law, this petitioner filed her petition in said Circuit Court of

Appeals praying for a rehearing in each of said cases (Tr. p. 257), and by order entered by said Court on April 11, 1940, the rehearing was denied. (Tr. p. 263).

The insurance contracts appear in the record (Tr. pp. 17, 19 to 34 both inclusive), and were in full force and effect on the 11th day of July, 1938, the date of the insured's death. (Tr. p. 45.)

Charles C. Moon was on that date living with his wife at Number 1121 West Fourth Street in the City of Huntington, Cabell County, West Virginia, and was the father of two children, Jackie, aged twelve, and Maudine, aged Nine. (Tr. p. 106.) About four o'clock P. M. on Monday, July 11, 1938, the said Charles C. Moon, a man of medium build, 5 feet and 9 inches tall (Tr. pp. 148-149-39), was found dead in the small fish pond or lily pool at the rear of his home aforesaid. (Tr. pp. 48-50-52-54.) The pool, built of concrete, was rectangular in shape extending generally north and south. (See picture, Tr. pp. 46, 244 (a).) It was 85½ inches long, 57 inches wide, and 22½ inches deep (Tr. p. 56), and normally had about 16 inches of water in it. (Tr. p. 151.) In the pool at the time, on the west side, was a tub containing water lilies; an earthen or stone jar containing cat-tails, and water hyacinth growing on the surface of the water (Tr. pp. 57-145), and a concrete block of two steps, unstable and loose (Tr. pp. 56-59-71), near to which steps were found the feet of the deceased. (Tr. pp. 56-71.) The northwest corner of these steps showed a recent violent blow, and over and across from the steps on the west side of the wall was a mark presumably where the steps had violently kicked or struck the side of the pool (Tr. pp. 59-60-74), and on the wall, at this place, was a fresh chip from the concrete steps. (Tr. pp. 59, 74.) Floating on the surface of the water was the hat of the insured. (Tr. p. 57-72.) The water was cut off at this hour and was only about 9 or 10 inches deep (Tr. pp. 74-58-52), and the insured,

fully clothed, was lying face up in the pool (Tr. pp. 52-57) his head in the northwest corner, his feet toward the southwest corner of the pool near these concrete steps, his knees, his hand, and his nose protruding from the water. (Tr. pp. 52-56-61-71.) The water in the pool was very bloody. (Tr. pp. 58-73.) The body of Moon was removed therefrom, and a deep wound in to the skull was discovered (Tr. pp. 57-75-86) on the back of his head just under the bulge. (Tr. p. 94.) An autopsy was performed by the Coroner of Cabell County, a medical doctor of considerable experience, which disclosed an incised wound on the bulge of the head about 2½ inches long, and the lower part of the cut muscle was bruised. (Tr. pp. 83-86.) The immediate cause of death was drowning. (Tr. p. 91.) In the opinion of the Coroner the wound on the back of the head was of the type which could have been caused by striking the back of the head upon the side of the pool or on the drain pipe which protruded about 3 inches from the bottom of the pool at the place where the head was lying (Tr. pp. 87-88), and was sufficient to have caused unconsciousness. (Tr. p. 88.) All other findings were normal. (Tr. p. 89.) In the opinion of the Coroner, the insured had probably been dead since 5:00 or 6:00 A. M. (Tr. p. 83.)

There were no eye witnesses to the death, nor had the insured been seen by any one since about 5:00 A. M. of that day.

The evidence discloses that Moon was of a very happy, good-natured, disposition. (Tr. p. 214.) Prior to April 30th of that year, he had been employed by the Koppers Stores at a salary of $405.00 per month (Tr. p. 181); he was discharged on February 28, 1938, by reason of his increasing inattention to his duties and due to the so-called business recession (Tr. p. 181), receiving his pay, however, until April 30, 1938. (Tr. p. 185.) He was a high-grade salesman (Tr. p. 218), and after April 30th, had been sell-

ing dictaphones (Tr. p. 216); the amount of his earnings is not disclosed, although his bank account shows that in the period since April 30, 1938, to the date of his death, he had deposited $386.47 (Tr. p. 196-197); that he had been licensed as a sales representative of the Income Estates of America, of Philadelphia, for selling trust certificates, as of July 1, 1938, and was expecting to go to work any day, merely waiting for his remuneration contract from the Company (Tr. p. 216); that there was a wide field for that business, and Moon was very enthusiastic about this work (Tr. pp. 187-218); that he had his automobile (Tr. p. 112) and owned his home (Tr. p. 228), and presumably his household furniture; that he was hard up for ready cash, as thirteen checks had been presented to the bank, size not shown (Tr. p. 191), number of times repeated unknown (Tr. p. 198), which had been refused on account of insufficient funds, although the only indebtedness as shown by the record to have been outstanding at the time of his death, was $40.00 to Schoenbaum (Tr. p. 212), and $20.00 to one Deeba, the latter presumably given for a gambling debt on the early morning of his death. (Tr. p. 204.)

About 9:00 P. M. on Saturday Night, July 9, 1938 (32 hours before Moon, presumably, died, and 43 hours before his body was found), Moon and his wife had an argument, which began when Moon wanted to go on a party that night (Tr. p. 112-113), and his wife demanded that he stay at home. A short while later, and within about an hour following, Moon apparently left the home; came back without letting his presence be known, and listened in on the statement of his wife to his friends that he (Moon) "would not work around the house to put in some screens to keep the flies out, as he was a 'high-flyer' ". He came into the hearing of the friends and his wife; acted very angry; said he was going to a party (Tr. pp. 113-155-159), and went into his home—presumably preparing to go to the party. His wife, a short while later,

left the garage apartment in the rear of the home, where such events occurred, and, entering from the rear, went in the home, finding her husband in the living room writing a note, and as she approached he closed the notebook. (Tr. p. 113.) She tried to "get him out of his mood", but she was unable so to do, and Moon went on to his party (Tr. p. 114). He stayed out all night Saturday, all day Sunday, and all Sunday night (Tr. p. 153); was seen in a gambling house gambling early Monday (Tr. pp. 203-209-219), got his breakfast at a lunch counter downstairs from the gambling room about 4:00 A. M. on July 11th (Tr. p. 201), and then went home, arriving there around 5:00 A. M. A chain placed on the door prevented the use of his latchkey to gain admittance, and, upon his knocking, his son Jackie went to the door, admitted him, gave him the paper, and then went upstairs and crawled in bed with his mother. (Tr. pp. 100-107.) Moon stayed downstairs for a time and then came upstairs. Mrs. Moon and the son were at that time in one of the twin beds, she facing away from the door. The wife and son did not speak, but heard Moon in his accustomed chair, apparently in the act of removing his clothing. Moon did not speak, and in a few moments they heard him going downstairs; heard the door open and close, and they went back to sleep. (Tr. pp. 101-107.)

Around 8:30 A. M. Monday, July 11th, Mrs. Moon got up; Jackie, the son, preceded her down the steps, and finding an envelop on the little table in the living room near the davenport (Tr. p. 101) took it to his mother, who was then descending the stairs. (Tr. p. 108.) This note bears date the preceding Saturday night, refers to the incidents of Saturday night, namely, the argument which occurred when the reference was made to him being a "high-flyer", and which note appears at large in the record. (Tr. p. 110.) When Mrs. Moon received this note she at first refused to read it and asked for a match to burn it, but, upon the request of her son, read and, after

reading it, tore it up into bits and put it in the waste-paper basket. (Tr. p. 116.) In its then torn condition it was delivered, at Mrs. Moon's request to the Coroner, who pieced it together. (Tr. pp. 91-76-152.) Mrs. Moon prepared breakfast for the children; Jackie went out to play (Tr. p. 102); Mrs. Moon and a friend went down town to look for Mr. Moon (Tr. p. 49), and she was preparing again to go look for him at the time she discovered his body while going to the apartment garage for the purpose of cleaning it. Tr. p. 143.) As Mrs. Moon was going to this apartment garage, because of the fact that there was a leak in the pool which in dry weather caused a vast seepage, and as she had last observed the water the preceding afternoon (Sunday) when she saw that the water was running enough to keep it filled to the proper level, and thinking of the possibility that the fish in the pool would be dead, she started to examine the same. (Tr. pp. 144-145.) Upon approaching the pool she saw her husband's body, when she became hysterical and was attended by her friends. (Tr. pp. 48-50-95-98.) Moon was much interested in flowers and was seen frequently at the pond before going to his work (Tr. p. 96), and a few days before his death he had suggested that the cat-tails in the pond should be moved, and, his wife objecting, he said he would move them one of these days. (Tr. p. 147.)

The note in question, Marked "Exhibit 11" (Tr. pp. 110), is incorrect in point of fact as to the amount of insurance, as is shown by this record, and the tenor and effect argues, as petitioner contends, it was just a scare note, for on other previous occasions, when Moon wished to control his wife, he had threatened or suggested suicide. (Tr. pp. 126-129-134-135-136-138-162.)

Sometime soon after having written the note (Plaintiff's Exhibit 11), Moon wrote a letter to the Kimball Bank which expressed hope and enthusiasm for his new

work. (Tr. p. 193.) There is no evidence where Moon was ever moody, depressed, threatened to take his life, or even suggested suicide, except in those instances when he sought to control his wife as above set out.

The jury heard all the evidence, and at the conclusion thereof, and after argument of counsel, the Court charged the jury that the plaintiff must prove by a preponderance of the evidence the fact of accidental death before she could recover, and that in the event they be not satisfied, by a preponderance of all of the evidence, that death was accidental, or if their minds were evenly balanced upon the question of death by accident or death by suicide, they must find for the defendants. (Tr. p. 231.) After the jury had been out some short while, they returned into court and asked that the portion of the charge that instructed them as to what verdict to render should their minds be in a state of equipoise be re-read to them, which request was granted by the Court (Tr. p. 243), and thereafter the jury brought in a verdict for the petitioner (Tr. p. 12) which this petitioner asserts gives her the right to interpret the facts in this case in a light most favorable to the verdict. Judgment was entered upon said verdict. (Tr. p. 13.) The appeal of the defendant from said judgment resulted in the decision of the Circuit Court of Appeals of which petitioner complains.

## II.

## STATEMENT DISCLOSING BASIS UPON WHICH THIS COURT HAS JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Section 240, Judicial Code, as amended (U. S. C. A., Title 28, Sec. 347 (a)).

## III.

## QUESTIONS INVOLVED

The following questions are involved:

1. The insurance contract in question, being a West Virginia Contract, did not the Circuit Court of Appeals err in failing to apply the general law of West Virginia as announced by the Court of last resort of that state with reference to

(a) the presumption against suicide,

(b) that suicide was an affirmative defense casting the burden of proof upon the defendant,

(c) that in a case where all the facts are circumstantial that the evidence must clearly establish suicide to the exclusion of every reasonable hypothesis consistent with death by accident,

(d) the right of trial by jury,

(e) that the inferences to be drawn from the evidence are not a question of law, but of fact to be settled by the jury,

(f) that the verdict of the jury is looked to to settle the issues made and the inferences to be drawn from the evidence (Tr. p. 262).

2. Did not the Circuit Court of Appeals err in drawing its own inferences from the evidence contrary to the verdict of the jury? (Tr. p. 262.)

3. Did not the Circuit Court of Appeals err in substituting its own view, inferences, conclusions and beliefs (Tr. p. 250) from the evidence for the verdict of the jury so returned? (Tr. p. 263.)

4. Did not the Circuit Court of Appeals, by its judgment, deny to the petitioner a trial by jury guaranteed to her by the 7th amendment to the United States Constitution?

## IV.

## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Petitioner earnestly contends and respectfully submits that the writ of certiorari should be granted to review the judgment entered by said Circuit Court of Appeals for the following reasons:

1. Said Court has decided an important question of local law in conflict with the applicable local decisions, which decision will, in the future, permit the use of one rule of law in like insurance cases if the cause be tried in the Federal Court, and a different rule if the action be tried in the State Courts.

2. Said Court has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise by this court of its power of supervision in the following particulars, viz:

(a) In effect denied trial by jury.

(b) Substituted its own beliefs and opinions for the verdict of the jury.

(c) Drew inferences from the evidence in conflict with the verdict of the jury.

(d) In effect denied the application of the rule as to local law announced by this Honorable Court in Erie R. Co., v. Tompkins (304 U. S. 64), and in effect reestablished

in said Circuit the rule with reference to local law found in Swift v. Tyson (16 Pet. 1, 18), Black & White Taxicab & Transfer Co. vs. Brown & Yellow Taxicab & Transfer Co. (276 U. S. 518), and New York Life Ins. Co. v. Gamer. (303 U. S. 161.)

3. The public interest will be promoted by a prompt settlement in this court of the questions involved herein.

WHEREFORE, YOUR PETITIONER RESPECTFULLY PRAYS that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and send to this Court, for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, namely: Number 4571—The Home Life Insurance Company of New York, a corporation, Appellant vs. Harriet K. Moon, Appellee, and that the said judgment of the Circuit Court of Appeals for the Fourth Circuit rendered in said case may be reversed by this Honorable Court and the judgment of the District Court for the Southern District of West Virginia reinstated and affirmed, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

HARRIET K. MOON

By THOMAS WEST PEYTON IV
Attorney for Petitioner.

ERNEST E. WINTERS, JR.
Of Counsel for Petitioner.

# Supreme Court of the United States

OCTOBER TERM, 1939

NO.....

HARRIET K. MOON, *Petitioner*,

VS.

HOME LIFE INSURANCE COMPANY OF NEW YORK, a corporation, *Respondent*.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### I.

### OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit rendered in this case is reported in 110 Fed. (2d) page 184, and also appears at pages 248-256 of the Transcript of Record.

### II.

### JURISDICTION

1. The date of the judgment sought to be reviewed herein is March 12, 1940, (Tr p. 256); the date of order denying a rehearing was entered on April 11, 1940. (Tr. p. 263).

2. The jurisdiction of this Court is invoked under the provisions of Sec. 240 (a) of the Judicial Code, as amended. (U.S.C.A., Title 28, Sec. 347 (a).

## III.

## STATEMENT OF THE CASE

A full statement of the case will be found under the heading "Summary Statement of the Matters Involved" in the Petition filed herein, to which this brief is appended, and in the interest of brevity will not be repeated.

## IV.

## SPECIFICATION OF ERROR

The errors of the Circuit Court of Appeals urged by the petitioner are set forth in the petition herein under the heading "Reasons Relied on for the Allowance of the Writ" and for the sake of brevity will not be repeated here.

## V.

## SUMMARY OF ARGUMENT

**I. The Court erred in failing to apply the rules and laws of the State of West Virginia to the case at bar.**

**II. The Court erred in drawing its own inferences from the testimony contrary to the verdict of the jury.**

**III. The Court erred in substituting its own opinion of the evidence for the verdict of the jury.**

**IV. The Court, in effect, denied trial by jury.**

## VI.

## ARGUMENT

### POINT I.

**The Court erred in failing to apply the rules and laws of the State of West Virginia to the case at bar.**

The insurance policy contracts in suit were applied for by the insured, countersigned by the resident agent, and delivered to the insured, Charles C. Moon, while he was a resident of West Virginia (Tr. pp. 19 to 40 both inclusive), and it is conceded that the insurance policies sued on were West Virginia contracts. (Tr. p. 250). These suits were instituted in the Circuit Court of Cabell County, West Virginia, a state court, and were removed to the Federal Court by reason of diversity as to citizenship. (Tr. p. 246). It is our contention, therefore, that the laws of West Virginia should govern the construction, rights, privileges, the burden of proof, and the right of trial by a jury accruing under the West Virginia law. (Erie R. Co. vs. Tompkins, 304 US 64, 82 L. ed. 1188; Sec. 725, Title 28, U. S. C. A.; and City Service Oil Co. v. Dunlap, — US — 84 L. ed. 185.)

**(a) The rule of reasonable doubt in cases such as this applies in West Virginia.**

This question was first considered by the West Virginia Supreme Court of Appeals, the court of last resort of that State, in *Beard v. Indemnity Insurance Company*, 65 W. Va. 283, 64 S. E. 119, which was a case involving the construction of an accident insurance policy, and the court, in deciding the question, stated the law to be (2nd point of the syllabus):

"In such case, unless the injury is shown to have been intentionally self-inflicted, or intentionally inflicted by some other person, legal presumption is that it was accidental."

In *Goodbar v. Western & Southern Life Insurance Company*, 89 W. Va. 221, 108 S. E. 896, the question again arose in an insurance case involving the effect of an exception in the policy of insurance in the event insured died from suicide, and the said court held (2nd point of the syllabus):

"Where, in a suit on a policy of life insurance, the defendant relies upon a provision of the policy defeating recovery if the insured dies from suicide, while sane or insane, within two years from the date of the policy, the evidence to show that the insured's death was suicidal must be clear and satisfactory, and where circumstantial evidence is relied upon for such purpose, such circumstances must establish that death resulted from suicide to the exclusion of every reasonable hypothesis consistent with death from natural causes."

And the Court further held, in such case, that suicide will not be presumed.

In *Martin vs. Mutual Life Insurance Company*, 106 W. Va. 533, 146 S. E. 53, a case involving a contract of insurance with double indemnity in case of accidental death the said Supreme Court held (Point 1 of the syllabus):

"Where a plaintiff, suing to recover upon a policy insuring against death from bodily injury effected solely through external violence and accidental means, made a prima facie case thereof, the burden then rests upon the defendant to establish the affirmative defense that the insured came to his death as a result of a violation of law, a cause of liability excepted in the policy."

and this case considered and reaffirmed the former holdings.

Subsequently, the Supreme Court of Appeals of the State of West Virginia reconsidered the question in *McDaniel vs. Metropolitan Life Ins. Co.* (W. Va.), 195 S. E. 597, and the Court, without overruling or disturbing the earlier decisions, reiterated the rule in this language:

> "The defendant, in relying upon suicide as a defense to this action, assumes the burden of proof on that point * * *, and where circumstantial evidence is relied upon for such purpose such circumstances must establish that death resulted from suicide to the exclusion of every reasonable hypothesis consistent with death from natural causes."

And in *Beckley National Exchange Bank v. Provident Life and Accident Insurance Co.* (W. Va.), 2 S. E. (2d) 256, the court again approved the rule, but did not apply the same in that case due to the fact that the death of the insured was explained, for the wife shot her husband.

And so, therefore, the Supreme Court of Appeals of West Virginia has established the rule in such cases that where death is shown to have been caused by violent and external means a prima facie case has been made; and where it is contended that the injuries were self-inflicted, the burden of proof is upon the defendant, and unless the evidence establishes suicide to the exclusion of every reasonable hypothesis consistent with death from natural causes, the plaintiff is entitled to a decision upon the evidence.

This rule was recognized by the Circuit Court of Appeals for the Fourth Circuit in *Tabor v. Mutual Life Insurance Company of New York* (C. C. A. 4), 13 F. (2d) 765, which was a case arising within the State of West

Virginia, and appealed to that Court; also a presumption of death from 7 years absence was held binding on said court in *Metropolitan Life Ins. Co. v. Goodwin* (C. C. A. 4), 92 F. (2d) 274.

This rule of law was contended for by plaintiff in the District Court by the request for instructions to the jury to be embodied in the charge of the Judge, which requests were refused. (Tr. pp. 235 to 243.) It was again contended for in the Circuit Court of Appeals (Appellee's brief and in Petition for Rehearing) (Tr. p. 257).

Giving effect to this rule, we respectfully submit that by evidence adduced herein the plaintiff fully established her case and that there is no basis in the evidence for a judgment in favor of the defendant.

**(b) Under the West Virginia Constitution the plaintiff is entitled to a jury trial.**

The constitution of the State of West Virginia has embodied in it the bill of rights, with certain modifications necessary from a local standpoint, and which is known as *Article 3*. Section 13 of Article 3 of that Constitution is as follows:

> "In suits at common law where the value in controversy exceeds $20.00 exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit before a Justice a jury may consist of six persons. No fact tried by a jury shall be otherwise reexamined in any case than according to the rules of the common law."

After removal of this cause to the District Court, plaintiff demanded and was accorded a trial by jury. (Tr. p. 11.)

The West Virginia Supreme Court of Appeals under this constitution has said, in *Gibson v. City of Huntington*,

38 W. Va. 177, 18 S. E. 447, that when the jury, by its determination, finds certain facts, the Court cannot disturb that opinion even though it entertain a different opinion. To do so would be a denial of the right of trial by jury guaranteed by the Constitution of the State.

And so, we submit, that upon the facts in this case the plaintiff was entitled to have her case submitted, under West Virginia law, to a jury for its determination.

**(c) The jury is exclusively the judge of the weight of the testimony and inferences from it.**

The contention was raised in Beard v. Indemnity Insurance Company, supra, that inasmuch as all the facts were circumstantial and the defense was based on the ground that the insured had destroyed himself, that the matter was one for the Court, but the West Virginia court held:

> "Upon the evidence adduced in the case, the issues were properly to be disposed of by the jury."

In the case of *Young v. Home Life Insurance Company*, 115 W. Va. 716, 173 S. E. 566, a case in which the plaintiff was seeking a recovery for disability and the defense was upon the theory that the plaintiff was a malingerer, the court held (Point 3 of the syllabus):

> "The jury are exclusively and almost uncontrollably the judges of the weight of the testimony or *inferences from it.*" (Italics ours.)

This case further held:

> "* * * usually, when a prima facie case has been made out by the plaintiff as here, the question as to whether it has been rebutted is for the jury."

In McDaniel vs. Metropolitan Life Insurance Company, supra, the Court, in disposing of the contention that it was a matter for the Court instead of for the jury, quoted with approval from a case therein cited and approved the conclusions that,

> "and if *all* fair-minded men would agree that under the evidence offered death of the insured was the result of suicide rather than accident, the court should decide the question as one of law."

And so, under the decisions of the Supreme Court of Appeals for the State of West Virginia, if one should be in doubt from the evidence in this case as to whether or not the death of the insured was the result of suicide rather than accident, the question must be submitted to a jury, and the decision of the jury thereon is final and conclusive.

Needless to say the record of the case disputes any theory that all reasonable minds agree as to whether death was accidental or intentionally self-inflicted.

We would call attention to the opinion of the Circuit Court of Appeals of the Fourth Judicial Circuit in this case wherein it draws its own opinions, its own beliefs (so denominated) contrary to the verdict of the jury rendered in this case, and, ignoring the verdict of the jury, writes up its decision and judgment upon its own findings. We submit that this denies to the petitioner the right of trial by jury to which she is entitled under the law.

Under the West Virginia law, we submit that the evidence in this case together with the "presumption against suicide" must be submitted to the jury, for its determination and the Circuit Court of Appeals had not the right to set aside the verdict of the jury so returned which established the fact that the death of Moon was accidental.

All of which was contended for in the Circuit Court of Appeals in Appellee's Brief and in Petition for Rehearing. (Tr. pp. 257-263.)

## POINT II.

### The Circuit Court of Appeals erred in drawing its own inferences from the testimony contrary to the verdict of the jury.

We have heretofore set out the rule in West Virginia with reference to an appellate court drawing inferences from the testimony contrary to the verdict of the jury. In the petition of this petitioner for a rehearing, filed in the Circuit Court of Appeals, a number of inferences from the evidence contrary to the conclusions and inferences drawn from the evidence by the jury were pointed out, to which we particularly call the attention of this Court. (Tr. pp. 258 to 261.)

The rule is established by many decisions of the West Virginia court that upon appeal the evidence is to be considered in the light most favorable to sustain the verdict (See Davis v. Alford, 113 W. Va. 30, 166 S. E. 701; Wiseman vs. Ryan, 116 W. Va. 525, 182 S. E. 670; Coleman v. N. & W. Railway Co., 100 W. Va. 679, 131 S. E. 563), and this rule is in conformity with a like rule established by the decisions of the said Circuit Court of Appeals for the Fourth Circuit. (See Hartford Fire Insurance Co. v. Kiser (C. C. A. 4th, 64 F. (2d) 288.)

The Circuit Court of Appeals, in its opinion, recognizes that it is drawing inferences from the evidence by the use of this language:

> "There is very little dispute as to the evidence in this case, though there is wide divergence of opinion as to the proper inferences, both great and small, to be drawn from this evidence."

(Tr. pp. 249-250.) And again speaking of the second note, the one which bears date on the Saturday preceding deceased's death, the Circuit Court in its opinion said:

> "Literally and figuratively, this second note (we believe), was written when insured was in *dead* earnest." (Tr. p. 254.)

These illustrations, we submit, but sustain the conclusion expressed and apparent upon the face of the opinion that the Court gave no consideration to the evidence in a light most favorable to the verdict, but drew its own inferences from the evidence and made its own finding thereon.

## POINT III.

### The Circuit Court of Appeals erred in substituting its own opinion of the evidence for the verdict of the jury.

From the foregoing, it is conclusive, we submit, that the Circuit Court of Appeals has substituted its own opinion, derived from the inferences and beliefs drawn by it from a reading of the evidence, without the opportunity of seeing and hearing the witnesses, and by entering judgment thereon, refusing to accord any weight whatsoever to the verdict of the jury rendered in this case and the actions of the trial judge in entering judgment on that verdict.

We submit that the weight and balance of evidence was for the jury, and their conclusions upon it in respect to its preponderance when fairly reached is not reexaminable. (See Ives v. Grand Trunk R. Co., 144 U. S. 408, 36 L. ed. 485 and Best vs. District of Columbia, 291 U. S. 411, 78 L. ed. 882.) This question was also raised in the Circuit Court of Appeals upon the petition for a rehearing. (Tr. pp. 262-263.)

## POINT IV.

### The Court, in effect, denied a trial by jury.

Assuming for the sake of argument only, that the West Virginia law does not govern in this case, but that the case is triable under so called "Federal Law", we submit that under the seventh amendment to the Constitution of the United States a trial by jury was and is preserved to this petitioner.

In Capital Traction Co. v. Hof (174 U. S. 1), this Court held that where a trial by jury has been had in an action at law in a court either of the United States or of a state the facts there tried and decided can not be re-examined in any court of the United States otherwise that according to the rules of the common law of England.

In Goldman vs. United States, 245 U. S. 474, this Court held that a reviewing Court can not invade the province of the jury by determining questions of credibility and weight of evidence, and then drawing conclusions from the residuum of evidence that there is no evidence.

In Connecticut Mutual Life Insurance Company v. Latrop, Admr., 111 U. S. 612, 28 L. ed. 536, this court held that where a cause fairly depends upon the effect or weight of the testimony, it is one for the consideration and determination of the jury.

Again in Home Benefit Association v. Sargent, 142 U. S. 691, 35 L. ed. 1160, in an action to recover on a life insurance policy and in which the defense was based upon alleged suicide, this court held that on the evidence given in the bill of exceptions, the jury were fully warranted in finding the assured died by accident.

And in Best, Admr. v. District of Columbia, 291 U. S. 411, 415, 78 L. ed. 882, 885, this Court, speaking by the Chief Justice, said:

> "Where uncertainty arises either from a conflict of testimony or because, the facts being undisputed, fair-minded men may honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."

And lastly, in New York Life Insurance Co. v. Gamer, 303 U. S. 161, 82 L. ed. 726 (although now impliedly overruled as to the application of local law by Erie R. Co. vs. Tompkins, 304 U. S. 64), this court recognized the right of the jury to pass upon the evidence, and speaking through Associate Justice Butler, said:

> "In determining whether by the greater weight of evidence it has been established that the death of the insured was accidental, the jury is required to consider all admitted and proved facts and circumstances upon which the determination of that issue depends, and, in reaching its decision, should take into account the probabilities found from the evidence to attend the claims of the respective parties."

Attention is invited to the fact that in the trial Court and in the Circuit Court of Appeals the rule announced in the decision of the Circuit Court of Appeals for the Fourth Circuit, in Jefferson Standard Life Insurance Company vs. Clemmer, 79 F. (2d) 724-729 was followed and applied. The charge of the Court to the jury was the rule announced in said case (Tr. p. 231 to 235), and the jury was accordingly instructed contrary to the rule announced by the Supreme Court of Appeals of West Virginia as to presumption against suicide, as to the weight of the testimony and as to burden of proof. Under such very harsh rule, considered in the light of the West Virginia rule, and under such very definite instructions the jury returned a verdict in favor of the plaintiff. No error of any kind or character has been charged or asserted by the defendant insurance companies against any alleged error in the trial

court, and no exceptions by said defendants were taken to the charge of the jury as aforesaid, its only complaint being that the evidence was insufficient. This jury heard all of the evidence, saw and observed the witnesses, observed their demeanor and their conduct, and gave to all such weight as to them seemed right and proper, and, under the instructions of the Court, rendered their verdict. It is this verdict, so rendered, so recorded, and against which no error in its rendition is charged by the defendants, which is thus set at naught and supplanted by the inferences, beliefs, and opinions of a court who did not hear witnesses testify; had no occasion to observe their demeanor or their conduct.

Moon, the insured, died in a small fish pond or pool scarcely sixteen inches longer than his own body (Tr. p. 56) and which contained water not over sixteen inches deep (Tr. p. 151). Counsel for the Insurance Companies contend that Moon stood on the edge and jumped backward into this pond or pool and the Circuit Court of Appeals, by their opinion, conclude "that he did not fall into the pool accidentally". This version is not substantiated by the evidence. The evidence shows that Moon had his hat on his head when he fell, for his hat was found floating in the pool (Tr. pp. 57-72), and had he intended to kill himself, he would have removed his hat, which would have been a protection against any blow on the head; to permit it to remain on his head would possibly have defeated an attempt at suicide. The evidence does not indicate that Moon was standing on the edge of the pool prior to his fall, as was contended for by counsel for the Insurance Companies and was apparently followed by the Circuit Court of Appeals in their opinion, because the evidence distinctly shows that Moon stepped on the loose and unstable concrete block which served as steps in the pool, for in no other way can the chip on the edge of the pool and the mark on the wall where the steps struck be

accounted for. (Tr. pp. 59, 60, 74.) No man, attempting to end his life by striking his head at a particular place would select an unsecure step to stand upon from which to jump; particularly so when a secure solid place might just as easily have been found. To select such an unsecure place would be calculated to defeat his purpose. The fact that the wound is upon the back of the head clearly evidences that when he fell and struck the edge of the pool or the pipe in the bottom of the pool, he was face up. It is also clear that had Moon jumped into the pool in this manner he could not see what he was doing and was unable to judge accurately so as to be sure of producing the unconsciousness and drowning which would result in the loss of life. By jumping in the pool face down, all of these considerations would have been fulfilled. The fear of pain, of suffering, of severe injury, motivates all who attempt suicide to select a sure, effective and efficient way in which to put an end to life.

To accept the contention that Moon was a suicide, as adopted by the Circuit Court of Appeals, is to ignore uncontradicted evidence of the concrete step striking the west wall of the pool and leaving its mark and a chip thereon (Tr. p. 59-60); to ignore that Moon's feet were by and against this concrete step (Tr. p. 56); to ignore the protection that the hat would have afforded the back of the head, and to ignore the letter which Moon wrote to the Bank on the Sunday afternoon following the writing of the note of Saturday (Tr. p. 193). The jury pondered these questions and found, by its verdict, that the *physical facts* at the pool *did not* disclose suicide.

The Circuit Court of Appeals, in its opinion, referred at length to the note of Saturday night (Tr. p. 252), but Moon returned to his home after writing that note. The said Court also paid no heed whatever to the hope and expression stated in the letter written to the Bank follow-

ing the writing of the note of Saturday night. (Tr. p. 193.) The note of Saturday night cannot be considered positive proof of suicide; it is but an item in the chain of circumstances. Before there could be suicide, there must be an intent to destroy oneself, and the act or acts carrying out and consummating the intent thus formed. No one saw Moon die; there were no eye witnesses to his passing. The physical facts at the pool must be examined and be given *weight* also as evidence. The Court, under the law, has not been given the scales with which to weigh the evidence.

If we apply the rule of universal application which is fairly drawn from the decisions above quoted—that if all fair-minded men would not agree that under the evidence offered the death of the insured was the result of suicide, rather than accident, the question is one for the decision of a jury—to this case we find twelve men on the jury, and the District Judge, who, by the verdict and judgment, have confirmed the fact that Moon's death occurred from accident and the fact that the Circuit Court of Appeals, in its opinion, believes to the contrary, as announced in its opinion, but establishes the fact that the evidence is such that all fair-minded men would not agree thereon.

We assert that it was the right and prerogative of the jury to weigh in the scales of Justice these items of evidence, and, hence, under the Constitution and under the rules established by innumerable decisions, the petitioner is entitled, we submit, to have the question decided by the jury, and is entitled to have the Jury's verdict, that Moon died by accident, preserved to her as guaranteed under the Constitution.

## CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory power in order that the errors here pointed out may be corrected; that the judgment of the Circuit Court of Appeals may be reversed and the judgment of the District Court reinstated and affirmed in order that justice may be done this petitioner, and to that end a writ of certiorari be granted, and this Court should review the decision of the United States Court of Appeals for the Fourth Circuit and reverse the same.

Respectfully submitted,

By THOMAS WEST PEYTON IV
Attorney for Petitioner.

ERNEST E. WINTERS, JR.
Of Counsel for the Petitioner.

FILED
JUN 4 1940
CHARLES ELMORE CRO
CLER

# Supreme Court of the United States

OCTOBER TERM 1939

No. 124

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HARRIET K. MOON,
Petitioner,

vs.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, a corporation,
Respondent.

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## PETITION FOR WRIT OF CERTIORARI AND BRIEF OF PETITIONER

Thomas West Peyton IV,
Attorney for Petitioner.

Ernest E. Winters, Jr.,
Of Counsel for the Petitioner.

Standard Ptg. & Pub. Co., Law Printers, Huntington, W. Va.

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# Supreme Court of the United States

OCTOBER TERM 1939

No. .....

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HARRIET K. MOON,
Petitioner,

vs.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, a corporation,
Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioner, Harriet K. Moon, respectfully asks this Court to review, on writ of certiorari, that certain judgment of the United States Circuit Court of Appeals for the Fourth Circuit in the case of Mutual Benefit Health & Accident Association, a corporation, Appellant, vs. Harriet K. Moon, Appellee, entered on March 12, 1940, (Tr. p. 27) a petition for rehearing therein having been filed (Tr. p. 28) and a rehearing denied by said Court by order entered on the 11th day of April, 1940 (Tr. p. 34) all of which will more fully and at large appear by reference to a true copy of the record in said case, properly certified, herewith filed as a part hereof.

## I.

## SUMMARY STATEMENT OF THE MATTERS INVOLVED

Harriet K. Moon, the petitioner, instituted her action against the above named Mutual Benefit Health & Accident Association, a corporation, in the Circuit Court of Cabell County, West Virginia, a State court (Tr. p. 17) upon a certain insurance policy contract for accidental death benefits because of the accidental death of Charles C. Moon, the insured, and whose death occurred on July 11, 1938 (Tr. p. 1), the said insurance policy having been applied for within, countersigned and delivered to the insured while he was a resident of the State of West Virginia and in which state he resided at the time of his death. (Tr. p. 7.) (See also Transcript of Record in case of Moon vs. Home Life Insurance Co., also pending in this Court upon application for a writ of certiorari, and hereinafter referred to, pages 36 to 40.).

This suit was removed by the said Mutual Benefit Health & Accident Association from the State court to the District Court of the United States for the Southern District of West Virginia, upon the ground of diversity as to citizenship, the plaintiff being a resident of the State of West Virginia (Tr. p. 17), where it was tried to a jury. (Tr. p. 11.)

For the reason that the facts in this case were identical with the facts in the case of Harriet K. Moon vs. Home Life Insurance Co. of New York, a corporation, also instituted upon insurance policy contracts in the State Court aforesaid and likewise removed to the same District Court, the sole question of liability upon said policies being whether or not the insured, Charles C. Moon, came to his death solely from bodily injury caused by accident, or whether the said Charles C. Moon came to his death as the result

of self-destruction, (Tr. p. 4) (the other defenses in said answer being later withdrawn by stipulation) the District Court, by consent of the parties, directed the said causes to be tried together (Moon vs. Home Life Tr. p. 41) and by reason thereof the transcript of the evidence filed in the case of Harriet K. Moon vs. Home Life Insurance Co., a corporation, is also the record in this cause (Tr. pp. 15-36) and such parts of the record in that case are also made a part of this petition. At the conclusion of plaintiff's testimony, defendant moved for a directed verdict, which motion the Court overruled (Moon v. Home Life, Tr. p. 163), and thereafter at the conclusion of all the testimony the defendant again moved the Court for an instructed verdict upon the same grounds assigned in motion at conclusion of plaintiff's testimony, which motion was again overruled by the Court. (Moon vs. Home Life, Tr. p. 230.)

The jury found a verdict in favor of this petitioner for Five Thousand Dollars ($5,000.00) the face of the policy, and the defendant moved to set aside said verdict and grant it a new trial, (Tr. p. 12.) which motion the Court overruled and judgment was thereupon entered by said District Court on July 6, 1939 in favor of this petitioner against said Mutual Benefit Health & Accident Association, a corporation, defendant for said sum of Five Thousand Dollars ($5,000.00) and costs. (Tr. p. 13.)

From this judgment the said Mutual Benefit Health & Accident Association appealed to the United States Circuit Court of Appeals, Fourth Circuit, (Tr. p. 14) which court, after a hearing (Tr. p. 18), in an opinion by Circuit Judge Dobie, (Tr. p. 19) entered its judgment on March 12, 1940, reversing said judgment in favor of petitioner, with costs, and remanding said cause to the said District Court with directions to set aside said verdict and to enter judgment in favor of the said Mutual Benefit Health & Accident Association (Tr. p. 27).

Thereafter, and within the time provided by law, this petitioner filed her petition in said Circuit Court of Appeals for a rehearing of said cause, (Tr. p. 28) and by order entered by said Court on April 11, 1940, a rehearing was denied. (Tr. p. 34).

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For the reason that the other facts involved in this cause and this application are fully stated in the petition of Harriet K. Moon vs. Home Life Insurance Co. for a writ of certiorari, filed contemporaneously herewith, reference is made thereto and the same is made a part hereof for a statement of the facts involved in this cause.

## II.

## STATEMENT DISCLOSING BASIS UPON WHICH THIS COURT HAS JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Section 240 (a), Judicial Code, as amended, (U.S.C.A., Title 28, Sec. 347 (a).

## III.

## QUESTIONS INVOLVED

The following questions are involved:

1. The insurance contract in question, being a West Virginia contract, did not the Circuit Court of Appeals err in failing to apply the general law of West Virginia as announced by the Court of last resort of that state with reference to

(a) the presumption against suicide,

(b) that suicide was an affirmative defense casting the burden of proof upon the defendant,

(c) that in a case where all the facts are circumstantial that the evidence must clearly establish suicide to the exclusion of every reasonable hypothesis consistent with death by accident,

(d) the right of trial by jury,

(e) that the inferences to be drawn from the evidence are not a question of law, but of fact to be settled by the jury,

(f) that the verdict of the jury is looked to to settle the issues made and the inferences to be drawn from the evidence. (Tr. p. 28.)

2. Did not the Circuit Court of Appeals err in drawing its own inferences from the evidence contrary to the verdict of the jury? (Tr. p. 29.)

3. Did not the Circuit Court of Appeals err in substituting its own view, inferences, conclusions and beliefs (Tr. p. 19) from the evidence for the verdict of the jury so returned? (Tr. p. 33.)

4. Did not the Circuit Court of Appeals, by its judgment, deny to the petitioner a trial by jury guaranteed to her by the 7th amendment to the United States Constitution?

## IV.

## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Petitioner earnestly contends and respectfully submits that the writ of certiorari should be granted to review the judgment entered by said Circuit Court of Appeals for the following reasons:

1. Said Court has decided an important question of local law in conflict with the applicable local decisions, which decision will, in the future, permit the use of one rule of law in like insurance cases if the cause be tried in the Federal Court, and a different rule if the action be tried in the State Court.

2. Said Court has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise by this Court of its power of supervision in the following particulars, viz:

(a) In effect, denied trial by jury.

(b) Substituted its own beliefs and opinions for the verdict of the jury.

(c) Drew inferences from the evidence in conflict with the verdict of the jury.

(d) In effect, denied the application of the rule as to local law announced by this Honorable Court in Erie R. Co., vs. Tompkins (304 US 64) and, in effect, re-established in said Circuit the rule with reference to local law found in Swift vs. Tyson (16 Pet. 1, 18), Black & White Taxicab & Transfer Co. vs. Brown & Yellow Taxicab & Transfer Co., (276 US 518) and New York Life Ins. Co. vs. Gamer. (303 US 161.)

3. The public interest will be promoted by a prompt settlement in this Court of the questions involved herein.

WHEREFORE, YOUR PETITIONER RESPECTFULLY PRAYS that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and send to this Court, for its review and determination, on a day certain

to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, namely: Number 4572 — Mutual Benefit Health & Accident Association, a corporation, Appellant, vs. Harriet K. Moon, Appellee, and that the said judgment of the Circuit Court of Appeals for the Fourth Circuit rendered in said case may be reversed by this Honorable Court, and the judgment of the District Court for the Southern District of West Virginia reinstated and affirmed, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

HARRIET K. MOON,

By Thomas West Peyton IV,
Attorney for Petitioner.

Ernest E. Winters, Jr.
Of Counsel for Petitioner.

# Supreme Court of the United States

OCTOBER TERM 1939

No.....

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HARRIET K. MOON,
Petitioner,

vs.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, a corporation,
Respondent.

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## BRIEF IN SUPPORT OF PETITION

This case and the case of Harriet K. Moon vs. Home Life Insurance Company, in which a petition for writ of certiorari was filed in this Honorable Court contemporaneously with the filing of the petition in this case, involve the same facts and questions, were tried together in the District Court, the Transcript of the Record in the case of Moon vs. Home Life Insurance Co., as to the evidence at the trial, is also the record in this case (Tr. p. 36), and the legal points arising thereon are identical. We therefore hereby make the Brief in support of the Petition for writ of certiorari filed in this Court in the said case of Harriet K. Moon vs. Home Life Insurance Co., a part hereof, and to which reference is made for a presentation of the points involved.

It is therefore submitted that this case is one calling for the exercise by this court of its supervisory power in order that the errors here pointed out may be corrected; that the judgment of the Circuit Court of Appeals may be reversed and the judgment of the District Court re-instated and affirmed in order that justice may be done this petitioner, and to that end a writ of certiorari be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Fourth Circuit and reverse the same.

Respectfully submitted,

Thomas West Peyton IV.
Attorney for Petitioner.

Ernest E. Winters, Jr.,
Of Counsel for the Petitioner.

CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1940

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HARRIET K. MOON, *Petitioner*,

vs. || No. 123

HOME LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, *Respondent*.

HARRIET K. MOON, *Petitioner*,

vs. || No. 124

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, a Corporation, *Respondent*.

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BRIEF IN OPPOSITION TO AWARD OF WRITS OF CERTIORARI.

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HARRY SCHERR,
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Standard Ptg. & Pub. Co., Law Printers, Huntington, W. Va.

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# Supreme Court of the United States

OCTOBER TERM, 1940

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HARRIET K. MOON, *Petitioner*,

vs. || No. 123

HOME LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, *Respondent*.

HARRIET K. MOON, *Petitioner*,

vs. || No. 124

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, a Corporation, *Respondent*.

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## BRIEF IN OPPOSITION TO AWARD OF WRITS OF CERTIORARI.

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### I

The judgments which this court is asked to review ~~is~~ are found in the opinion of the United States Circuit Court of Appeals, Fourth Circuit, which is reported in 110 Fed. (2d) 184. Also, the opinion appears at pages 248-256 of the transcript of the record.

### II

Although the two cases set forth in the caption are separate and distinct and a petition for writ of certiorari in each has been filed, we deem it appropriate, for the convenience of the court, that only one brief in opposition to the granting of the writs be filed; for the reason that, while the record in each case has been filed, the record in

the Mutual Benefit case (No. 124) is skeleton in form and contains, substantially, only the pleadings, orders, notice of appeal, docket entries, petition for rehearing, etc., applicable thereto, and certain other orders and papers, such as the judgment and opinion of the Circuit Court, which latter are also contained in the record in the Home Life case (No. 123). The record in the Home Life case, in other words, is complete for purposes of the consideration of the petitions in both cases. It contains the contracts sued on in each case, all of the evidence (the cases having been tried together in the District Court), and the judgments of the Circuit Court which are embodied in one opinion. At page 36, transcript of the record in the Mutual Benefit case, appears the stipulation of counsel to the effect that the transcript of the evidence appearing in the transcript of the record in the Home Life case shall be used and read in the Mutual Benefit case.

## III

We deem it necessary that we include herein a concise narrative statement of the material facts shown in evidence. It will be noted that in doing so we first set forth the evidence of the petitioner (plaintiff in the trial court) and follow with the evidence of the respondents (defendants in the trial court); for the reason that it is important, as will appear hereinafter, for the court to observe just what evidence was produced by the petitioner in the trial court before resting her case, and that the evidence of the respondents was not in conflict therewith but merely supplemented the evidence of the petitioner upon the question of the suicide of the decedent.

1. Evidence of petitioner (plaintiff):

The two policies or accidental death benefit contracts of the Home Life Insurance Company are identical (Tr. pp. 19-34). The particular provision in each under which accidental death benefit is claimed (Tr. pp. 24, 32), reads as follows:

"Home Life Insurance Company, of New York, will pay under this contract * * * Five Thousand Dollars, upon receipt at the Home Office of the Company in the City of New York of due proof of the death of the insured and that such death occurred * * * and resulted solely from bodily injury caused by external means of an accidental or violent nature * * * and as a result thereof exclusive of all other causes; Provided, however, and this contract is made upon the express condition, that the Company shall incur no liability hereunder if death of the insured shall result * * * from self-destruction whether sane or insane."

The policy of the Mutual Benefit Health & Accident Association (Tr. pp. 36-40) is an accident policy. The provision under which benefit is claimed (Tr. p. 36) reads as follows:

"* * * Mutual Benefit Health and Accident Association * * * does hereby insure * * * Charles C. Moon * * * against loss of life, limb, sight or time, resulting directly and independently of all other causes, from bodily injuries sustained during any term of this policy through purely Accidental Means (Suicide, sane or insane, is not covered), and against loss of time beginning while this policy is in force and resulting from disease contracted during any term of this policy, respectively, subject, however, to all the provisions and limitations hereinafter contained. * * * If the insured shall sustain bodily injuries as described in the Insuring Clause, which injuries shall, independently and exclusively of disease and all other causes, continuously and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks, the Association will pay:

For loss of Life ..... $5,000.00
* * *"

Shortly before four o'clock on Monday afternoon, July 11, 1938, Mrs. Moon discovered the body of her husband and notified a neighbor (Tr. p. 48). The police were notified and arrived at something near four o'clock (Tr. p. 49). The body had not been disturbed. It was lying in the lily pond, lengthwise, with the head in a northerly direction and the feet toward the south. Deceased was on his back and the entire body submerged in water except a part of the nose, a small portion of the chest and the knee-cap of one leg. One arm was in a horizontal position by the side of the body and the other arm was across the chest. Other policemen arrived within a few minutes. (Tr. pp. 56-59.) The pool is directly back of the residence building. It is 85½ inches in length; 57 inches in width; and 22½ inches deep (p. 56). There was a portable concrete step in the pool, in the southerly end of the pool, somewhat east of the decedent't feet, the feet being near the southerly center of the pool, the head of the body being in the opposite corner of the pool. There was found a fresh chip off this step on the side of the wall, *not* in the pool. Decedent was lying on his back and his hat floating on the water. The body was removed to an undertaking establishment before the Coroner arrived. (Tr. 56-59.) There was a superficial scratch over the left eye and a cut on the back of the head, about two and one-half inches long extending from the crown of the head towards the left ear, its depth being to the skull (Tr. pp. 84-86). Near the east wall of the pool (about two and one-quarter inches therefrom) and near decedent's head, there was a galvanized pipe—drain pipe—which protruded from the bottom of the pool about three inches (Tr. pp. 60-64). This pipe was sealed. At the west side of the pool, near the north end, on the ground about twelve inches from the side of the pool, there was a whiskey bottle containing a small amount of whiskey—the bottle perfectly clean indicating it had been there only a short time (Tr. pp. 61, 64-65).

The drain pipe was sealed and there was no drainage from the pool except through a crack in the concrete so there was some leakage (Tr. pp. 66-67, 144). And at the time of the first examination of the body (on Monday evening) the pool did not contain as much water as at the time Mr. Moon drowned. On Sunday evening the pool was at a level of about sixteen or seventeen inches with the water running into the pool (Tr. pp. 150-151).

The County Coroner, a physician, saw the body sometime after it had been removed from the pool. He gave it as his opinion that Mr. Moon probably had been dead since five o'clock or six o'clock in the morning (Tr. pp. 83-84); also that there was a very shallow cut over the left eye and a gash to the skull two and one-half inches long on the back of the head on the lower edge of which gash there was a bruise. The skull was not fractured (Tr. pp. 84-87). The gash wound was sufficient to cause unconsciousness (Tr. p. 89). The immediate cause of death was drowning (Tr. p. 91). Somebody told the Coroner that decedent had left a note or letter and he called upon Mrs. Moon who turned the note over to him, the same being torn into small pieces so that it had to be pieced together in order to be read (Tr. p. 91).

The evidence of Jackie Moon, son of decedent, aged eleven years, begins at p. 99, transcript. His father came home on the morning of his death about five o'clock. Jackie was awakened by the front door knocker and went down stairs and let his father in. They did not speak. Jackie then went upstairs and back to bed—in bed with his mother. Jackie arose about eight-thirty, went down stairs, and into the front room, and found an envelope on the table by the davenport addressed to his mother. By that time the mother was coming down the stairway. He gave the envelope to her. She said nothing. She was going to throw it away or burn it without reading it, but she did read it

and then tore it up. The father sometimes drank but Jackie was too sleepy to say whether he was drinking that morning (Tr. pp. 100-102).

After Jackie had opened the front door for decedent and had gone back to bed, the latter came up to the mother's room. Both Mrs. Moon and Jackie were awake but no word was spoken. Mr. Moon sat down, took off his hat and almost immediately left the room and left the house, as above (Tr. pp. 104-105).

The testimony of Mrs. Moon, this petitioner, begins at p. 105, transcript:

She heard her husband arrive in his automobile. After Jackie went down and let him in the front door Mr. Moon came up to her room. She admits no words were spoken and that in a little while Mr. Moon left by the front door. She knew he did not take the car. When she went down stairs about eight-thirty Jackie handed her the note. She looked for a match with which to burn it before reading it—she thought something ugly would be in it—but Jackie influenced her to read it. After fully identifying the note, petitioner produced it in evidence. (Tr. pp. 106-109.) The note (Tr. p. 110) reads as follows (the capitals shown are as per the note and the words "an accident" were underscored):

"7/9/38

"Harriet—

"I've heard your estimate of me to others. Of course, a man can't get a long way with that kind of publicity from his wife. You've made it impossible for me to go on. I hope and trust you'll be happy with me out of the way. BUT PLEASE try to be a wife, instead of a nag, to your next husband. Don't drive him to desperation, too.

"You'd better destroy this note for anything that happens must be *an accident*. REMEMBER THAT! It'll make a lot of difference in your insurance. That ought to keep you quiet for money means more to you than anything else, and the knowledge of this note would mean that you would collect about $5,000.00 less insurance. $5,000.00 ought to keep your mouth shut, but it's up to you.

"I'm sorry. We could have been happy together, if only you could have been a little more cooperative instead of so commanding and domineering. But the last straw was when I heard you belittling me to our friends.

"I've loved you, Harriet, all along, but you've made it impossible for me to go on. Again I hope you'll be happy now. C. C."

About eight-thirty on Saturday evening, July 9th, Mr. and Mrs. Moon had a quarrel. A Mr. Thacker lived in the apartment over the garage just back of the Moon residence. After the quarrel above referred to Mrs. Moon went to the apartment. Still later Mr. Moon came to the door of the apartment and told Mrs. Moon that he was going down town. He then got into the car and went out the driveway. Apparently, however, he did not leave the premises at that time because Mrs. Moon and Mr. Thacker had a conversation about screens for the apartment windows, or doors, during the course of which Mrs. Moon referred to Mr. Moon as a "high-flier." Whether Mr. Moon heard this or not is not shown, but Mr. Moon yelled up to the apartment at Mrs. Moon and she says that, while she does not know what she had said about Mr. Moon in the conversation with Mr. Thacker, Mr. Moon acted like he had heard "something a whole lot worse" (Tr. pp. 111-112). Still later Mrs. Moon left the apartment and went over to close her house and found Mr. Moon sitting in the front room. He and Mrs. Moon had some conversation but the latter

is very vague as to what was said. Mr. Moon had a note book in his hand and he "folded that together" and put it in his pocket and said he was going "on a party." She says Mr. Moon was mad, that he got up and went out of the house and that she followed him "clear out to the street," her object being to "get him out of the mood he was in." He then left the premises angry (Tr. pp. 113-114).

Over objection, Mrs. Moon was permitted to say that previously she had found a similar note written by Mr. Moon. She was pressed as to when this was and finally said "well, it wouldn't be more than two months." Her counsel had suggested a month or two and at the suggestion of the court she was asked to be more specific and she answered "well, it was a month or month and a half," and then she added "well, how about calling it a month? Would that be all right?" (Tr. pp. 126-127). She found this note either in the waste paper basket or down beside the kitchen sink (Tr. p. 129). Over objection, Mrs. Moon was permitted to say that on the same day she found the last mentioned note Mr. Moon told her he would commit suicide. Her counsel then again pressed her to fix the time and she said (as formerly, above) "well, would a month be all right?" On this occasion she says Mr. Moon took her in his arms and said that if anything happened to him it must be an accident. (Tr. p. 141).

About four o'clock on Monday afternoon Mrs. Moon went to look at the pool because the pool had been leaking—she kept the water running all the time—and found the body of Mr. Moon (Tr. p. 143-144).

Mrs. Moon's cross-examination begins on p. 148, transcript:

Mr. Moon was five feet and nine inches tall and of medium slender build (p. 149). Mrs. Moon undertook to keep the water in the pool at a level of sixteen or seventeen

inches. On Sunday afternoon the level of the water was about six inches or seven inches from the top of the pool (Tr. p. 151), and the pool had a depth of twenty-two and one-half inches (p. 56). The water was running into the pool on Sunday afternoon. It was off on Monday afternoon when she discovered the body (Tr. p. 151).

After Mrs. Moon and her son had read the suicide note she tore it into bits and threw the pieces into the garbage sack in the kitchen. Later she and a neighbor recovered them and pieced them together at the suggestion of the latter (Tr. p. 152).

Several people, including the family, were in the front room on Sunday. Mrs. Moon was in there and presumably the children; also visitors. These visitors and the family ate supper in that room. (Tr. pp. 152-153).

Mr. Moon, after leaving on Saturday evening after the fuss between him and Mrs. Moon, remained away all of Saturday night, all of Sunday and Sunday night (Tr. p. 153).

2. Evidence of respondents (defendants):

Mr. Moon carried several policies of insurance. He carried an accident policy in the Mutual Benefit Health and Accident Association the premiums whereon he paid quarterly, the last premium having been paid on June 1st, 1938 (Tr. pp. 164-165). He carried two policies on his life in the Home Life company in the sum of $5,000.00 each, attached to which were the accidental death benefit contracts involved herein. Settlement under the two life policies was made after Moon's death. The premiums, amounting to $146.10 on each policy, were payable annually on October 25th. The last payment of premium was made in October and November, 1937, Mr. Moon having paid $51.57 in cash and borrowed against the policies the

residue. He had borrowed previously against the policies. On June 7, 1938, thirty days before his death, he again borrowed on the policies by which the full loan value was exhausted. There would have been no value in the policies for the payment of premiums on October 25th, 1938. (Tr. pp. 166-169). Mr. Moon also carried policies in the Pacific Mutual Life Insurance Company and had been paying the premium on a monthly basis of $12.84. A monthly payment was due to be made on July 9th (Moon died on the 11th) in order to extend the insurance for an additional month. After banking hours on the 9th (Saturday) Mr. Moon gave a check covering this extension (Tr. pp. 170-172).

Until February 28, 1938, Mr. Moon had been employed by the Koppers Coal Company since late 1927 or early 1928. He was merchandise manager of the company stores with offices in the City of Huntington, West Virginia. His salary was $450.00 per month except during the last year during which his salary was $405.00 per month. As of February 28, 1938, Mr. Moon was discharged for "increasing inattention to duties", is the first reason given. However, he was paid his salary for March and April. On Friday preceding his death he applied to his former employer for a loan and was told there was "no chance" of his being granted a loan. In seeking this loan Mr. Moon represented that he would need money "to carry him over". (Tr. pp. 180-185.)

On July 11th, 1938, the day of his death, Mr. Moon had a balance of four cents in bank. On June 4th he had a balance of $125.00. Between July 1st and July 11th his largest balance was $1.04. During the period his checks were returned unpaid on account of insufficient funds. Thirteen checks were thus returned from June 22nd to July 9th and his bank balance was absorbed by the charges for these returned items. Other checks were presented to the bank and returned unpaid, for which no charge was

made because the balance would not admit of a charge. By letter of July 10th Moon enclosed to the bank for deposit the sum of $14.00 in currency which he directed should be applied to the payment of the Pacific Mutual premium check which would extend his policies in that company for thirty days from July 9th. (Tr. pp. 189-193.) This deposit was received by the bank on the 12th (p. 197). The ledger sheet showing Mr. Moon's account in the bank appears at pp. 196-197. With the exception of the $14.00 deposit and a deposit on June 20th of $41.00 no deposits were made after June 10th. Subsequent to losing his job he made sundry small deposits (pp. 195-197). It will be noted that he lost his job on February 28th but was paid salary for March and April and that he borrowed from the Home Life on his insurance on June 7th (Tr. pp. 185, 168).

At four-thirty o'clock on the morning of his death, Mr. Moon was in the Florentine Cafe, down town (p. 201). After midnight on that day, and until four-thirty, he was in a gambling house engaged in gambling (Tr. 203-204, 210). He was at the same place on Saturday night or Sunday morning (the 10th) gambling (p. 219). He got a check cashed for $20.00 which was returned by the bank unpaid (Tr. p. 204). While the check was returned because the maker was deceased, his balance in bank was four cents (p. 197). On June 17, 18 and 20 Mr. Moon negotiated three checks aggregating $40.00 which were returned by the bank unpaid (Tr. p. 212).

## IV

After the petitioner had introduced all of her evidence and rested her case, the respondents moved the court to direct a verdict for the Home Life Insurance Company in the one case and for the Mutual Benefit Health & Accident

Association in the other, assigning grounds therefor; which motions the court overruled and the respondents, respectively, excepted (Tr. pp. 163-164).

Again, after all of the evidence had been introduced by both the petitioner and the respondents, the respondents again moved the court to direct a verdict, as above, assigning grounds therefor; which motions again the court overruled and the respondents excepted (Tr. pp. 230-231).

The jury returned a verdict against respondent, Home Life Insurance Company for the sum of $10,000.00 and judgment was entered thereon (Tr. pp. 12-13).

The jury, also, returned a verdict against the Mutual Benefit Health and Accident Association for the sum of $5,000.00 and judgment was entered thereon (transcript of the record in Case No. 124 at pp. 12-13).

Within ten (10) days, under rule 50 of the Federal Rules of Civil Procedure, each respondent moved the court to set aside the verdict and any judgment thereon and to enter judgments for respondents (Tr. pp. 12-13).

Upon appeal by these respondents, the Circuit Court held that the controlling facts are conclusive that the insured's death was due to suicide; and the judgment in each case was reversed with direction to the District Court to enter judgment in favor of these respondents, respectively (Tr. pp. 248-256).

## V

As we understand the rule, review on writ of certiorari is a matter of judicial discretion and will not be granted, in cases such as these, unless the Circuit Court has decided an important question of local law in a way probably in conflict with applicable local decisions. Petitioner bases

her contention, that writs should be granted to review these judgments, upon that proposition. In support thereof, counsel assert that, the policies involved being West Virginia contracts, the Circuit Court failed to apply the local law, as interpreted by the court of last resort of that state, in the several particulars set forth in the petitions herein. We controvert that proposition and believe that we will be able to demonstrate that the judgments herein are in exact harmony with the general law of West Virginia.

In actions upon insurance contracts such as these—upon double indemnity contracts and accident policies, imposing liability upon the insurer only in case of accident—(1) there is no presumption against suicide; (2) it may or may not be an affirmative defense with the burden of proof upon the insurer; and (3) suicide is not required to be established to the exclusion of every reasonable hypothesis consistent with death by accident; and (4) in every law action where the evidence is such that the court would be impelled to set aside a verdict adverse to such evidence, it is the duty of the court, as a matter of law, to direct a verdict in conformity with such evidence. Such is the law in West Virginia. Therefore, our position may be stated as follows:

1. The evidence of the petitioner, augmented by the evidence of respondents which is in harmony and not in conflict with the evidence of the plaintiff, explains the cause of death to have resulted from suicide and not by accident; and,

2. The foregoing being a correct statement from the record, it was the duty of the court, as a matter of law, to direct a verdict in favor of the respondents, respectively; there remained no issue for jury determination.

## VI

The action against the Home Life Insurance Company was brought by the beneficiary (petitioner here) to recover, upon the theory of the accidental death of the insured, her husband, the principal sum of $5,000.00 under each of two (2) several double indemnity contracts which, by their terms, impose liability upon the insurer only in case the insured shall have come to his death solely from bodily injury caused by external means of a violent or accidental nature; but upon condition that in no event shall there be liability if death shall occur from self-destruction whether sane or insane.

The action against the Mutual Benefit Health and Accident Association was brought by the beneficiary (petitioner here) to recover, upon the theory of accidental death of the insured, her husband, the principal sum of $5,000.00 under an accident insurance policy which by its terms imposes liability upon the insurer in case of the death of the insured resulting directly and independently of all other causes from bodily injuries through purely accidental means, suicide, sane or insane, excepted.

These cases were tried together upon pleadings and proof, a jury having been impaneled to try the issues of fact.

The respondent in each case pleaded (1) that the death of the insured was not the result of accident and (2) that the death resulted from suicide.

A summary of the facts produced in evidence is pertinent.

There is no substantial conflict in the evidence. The body of the insured was found by his wife (petitioner) on a Monday about four o'clock in the afternoon submerged

in water in the lily pond in the back yard or garden of his home. Apparently death had occurred about six o'clock in the morning. The cause of death was drowning.

The evidence discloses no facts which support accidental death except conjecturally or speculatively. In other words, to justify accidental death one must say, as respondent would have us believe, that the insured went to the pool, between five o'clock and six o'clock in the morning under irrational if not unbelievable circumstances, to work with the lilies and other flowers in the pool and, having lost his balance, fell in and drowned. Upon the other hand, there is direct evidence, which was offered by petitioner, that the fact and manner of death resulted from premeditated self-destruction—that insured intended to destroy himself in a manner which must appear to be accidental—as disclosed by the suicide note which insured left on a table in the living room just after leaving his wife's bed-room (between five o'clock and six o'clock in the morning) and immediately before leaving the house and going to his death. This suicide note, in addition to disclosing self-destruction intent, and saying that death must appear to be accidental in order that accidental death benefit insurance could be collected, is buttressed by facts and circumstances showing provocation and motive. Several months before the insured lost an important executive position which paid him a considerable salary after which time he had had no substantial employment. His finances had dwindled to the extent that his money was gone—his bank account was overdrawn, numerous checks were outstanding, having been returned unpaid by the bank; he had borrowed on his insurance to its full loan value and insurance premiums were being paid monthly or quarterly. On Friday preceding his death he sought to borrow from his former employer. On Saturday evening preceding the Monday of his death, insured and his wife had an acrimonious dispute which resulted in insured leaving his home to which he did not return until Monday

morning, he having remained away all of Saturday night, all day Sunday and all of Sunday night, during which time or a considerable part of it he spent in a gambling house. Arriving at his home direct from a gambling house on Monday morning at about five o'clock, he went to his wife's bed-room. He sat in a chair for several minutes during which time, although the wife was awake and knew of his presence, she gave him no sign of recognition and no words were spoken. Fully dressed, the insured abruptly left the room, went down stairs and out the front door. All of this respondent knew, and she knew that, on leaving, insured did not drive away in his automobile, standing at the side of the house, in which he had returned home a short time before. At about nine o'clock when respondent came down stairs she was given the suicide note by her small son who had preceded her, he having found it on a small table in the living room. After reading the note, she sought to destroy it and went about her usual affairs at home and in trips down-town. As stated, she discovered the body in the pool about four o'clock in the afternoon.

It is shown in evidence that neighbors previously had observed the insured at the pool of mornings. Thereby we are asked to believe that decedent went to the pool as a usual incident in his every day life. One neighbor only saw him at the pool at any time and she says she had seen him there at around seven-thirty—between seven o'clock and eight o'clock—in the morning. She does not say she saw him many times at the pool in the morning; but she does say she never saw him there before around seven-thirty o'clock although she is up and around by five-thirty. We are asked to believe that, after having been away from home all of Saturday night, all of Sunday and all of Sunday night, in and around a gambling house, having arrived at his home at about five-thirty in the morning where he met with the utterly cold and unfeeling reception at the hands of petitioner, and after having

deposited the suicide note on the small table in the living room, the insured, at that early hour, went to the lily pond to change the location of the cat-tails.

We are told that a chip off the portable concrete steps was found. This is urged to support the conjecture that insured stepped upon the portable concrete steps, lost his balance, and in striking the side of the pool a piece of concrete was "chipped" off the steps. But this "chip" was not in the pool where it must have been if it had been "chipped off" in the manner counsel would have us believe. It was on the bank near the pool, outside the pool. This is conclusive that it was not "chipped off" at the time and in the manner counsel theorize. We must remember that, according to the suicide note, what happened to insured must be an accident, and we must assume that in everything he did at and in going into the pool insured had this in mind. Again, would the insured have been in the position his body was found if he had fallen? Would there not have been evidence of a struggle, the flowers disarranged?

We cannot ignore the quarrel between the insured and petitioner on Saturday night preceding the death of the former. The language used by petitioner does not correctly indicate what happened, and we insist that our detail of what occurred upon that occasion is correct from the transcript of the evidence. To our mind what occurred is significant. It was not the mild affair which counsel would have us believe. Petitioner on direct examination tells us what happened in language which indicates a climax had been reached in the life of the insured; the suicide note speaks more plainly.

Insured's financial plight cannot be minimized. It is true that after having been let out of his employment with the coal company he had some sort of agency with a Dictaphone Company, and that at the time of his death he was

about to become connected with a concern engaged in selling some sort of income certificates or contracts. But there is no evidence that insured had made any sales or had any income from any source since his discharge by the coal company as of February 28th. He was paid his salary for March and April. He borrowed against his insurance early in June. He had had cashed by individuals several checks which had been returned by the bank. These amply account for his deposits in bank. But the fact remains that he was out of funds. His finances were becoming more desperate each succeeding day.

It is said that the suicide note was a "scare" note and reference may be made to testimony as to other threats which is not in the evidence. But petitioner did not regard it as a "scare" note. At p. 118, transcript, out of the hearing of the jury, petitioner said, speaking of the suicide note in evidence, that "It worried me and I was really afraid that it might really be a suicide note". Whatever "scares" she had had previously, if any, petitioner felt that insured meant every word that he said in the note.

## VII

In her petition (pp. 10-11), and in the brief of counsel subjoined thereto (p. 14), the petitioner sets forth the questions involved, the reasons why writs of certiorari should be granted to review these judgments, and a summary of argument, all of which embrace the same propositions. Our position, as stated above, is (1) that the burden of proof was upon the petitioner to show death from accident wherein she wholly failed, having shown that the death of the insured resulted from suicide, and, (2) that being true, it was the duty of the court to have directed a verdict for each of the respondents — from the evidence there was no question of fact for the jury to pass upon; or, having permitted the case to go to the jury, and the jury having found adverse to suicide, it was the duty of

the court to set aside the verdicts and enter judgment for each of the respondents in conformity to the evidence of suicide.

1. The burden of proof was upon petitioner and her evidence explains that the cause of death was suicide.

The question at issue is whether the insured met his death from accident. These cases were tried upon pleadings and proof. In the former respondents denied that insured's death was caused from accident, and while they also set up that death was by suicide, this plea added no defensive merit — it only amounted to a denial that death was of the sort insured against. New York Life Ins. Co. v. Gamer, 303 U. S. 161, 82 L. ed. 726 (730); Travelers' Ins. Co. v. Wilkes, 76 F. (2d) 701.

Another distinction which is most pertinent is that the rule of evidence as to presumptions and burden of proof is different in actions upon double indemnity and accident insurance policies than in actions to recover upon life insurance policies. This is clearly stated in Jefferson Standard Life Ins. Co. v. Clemmer, 79 F. (2d) 724. Therein the court said:

> "The differences that have arisen as to which party bears the burden of persuasion in insurance cases, when the defense is based on suicide, have been caused in part by a failure to distinguish between cases in which the plaintiff sues on an accident insurance policy or the double indemnity clause of a life insurance policy, and cases in which the insurer in a life policy raises the defense of suicide. If death from any cause except suicide is insured against (as in a life policy), the burden is on the company to prove the exception; but if death from one specific cause, such as an accident, is insured against, the burden is on the policy holder to show that the condition precedent to liability has taken place."

This distinction is recognized and followed in West Virginia. In Goodbar v. Western & Southern Life Ins. Co. 89 W. Va. 221, 108 S. E. 896, the suit was upon a life insurance policy, and the court held that, in a suit upon a life insurance policy, where defendant relies upon a provision defeating recovery if the insured dies from suicide, the burden is upon the company to show suicide by clear and satisfactory evidence, and where the evidence relied upon is circumstantial, suicide must be shown to the exclusion of every reasonable hypothesis consistent with death from natural causes. To the same effect is Tabor v. Mutual Life Ins. Co. 13 F. (2d) 765—4th Circuit; also, McDaniel v. Metropolitan Life Ins. Co. 195 S. E. (W. Va.) 597. These cases are cited and quoted from by counsel for petitioner in their brief (pp. 16-17) and are their main reliance.

But in Martin v. Mutual Life Ins. Co. 106 W. Va. 533, an action upon a policy providing for payment in the event of death through external, violent and accidental means, the court said:

> "In an action upon a policy insuring against death resulting solely from external, violent and accidental means, the burden rests upon the plaintiff, in the first instance, to make out a prima facie case showing that the death resulted solely from external, violent and accidental means."

In other words, the distinction as to burden of proof in West Virginia, in cases upon life policies on the one hand, and accident and double indemnity policies upon the other, is precisely the same as announced in the Clemmer case, supra.

Therefore, the cases of Goodbar v. Ins. Co. and Tabor v. Ins. Company, supra, having been actions upon life policies, are not applicable here.

Having seen that in actions upon policies such as we have here the burden is upon the plaintiff to show accidental death, the next inquiry is what degree of proof does this burden impose? In the Martin case, supra, the West Virginia court says:

> "The plaintiff made out a prima facie case when she introduced proof establishing the death of Martin (the insured) by external and violent means. The proof of death by such means raised a presumption that the insured's death was accidental."

The foregoing, while adhered to in principle, was qualified by the West Virginia court in Beckley Bank v. Provident Life & Accident Ins. Co., 2 S. E. 2d (W. Va.) 256, in the following language:

> "When death occurs from *unexplained* violent and external means, an accident may be presumed; but the presumption is excluded when the cause of death is shown. The opinion in Martin v. Mutual Life Ins. Co. 106 W. Va. 533, on page 540, 146 S. E. 53, is qualified."

In the opinion in the case last cited, the court goes on to say:

> "Plaintiff takes the position that when death is shown to have occurred from external and violent means, even gunshot wounds, an accident will be presumed. Unfortunately, our case of Martin v. Mutual Life Ins. Co. 106 W. Va. 533, 540, 146 S. E. 53, supports that position without qualification. The better rule, as stated in one of the citations in the Martin case, is ' * * * * * * where death by *unexplained* violent external means is established, prima facie proof is thereby made of the fact that the injuries were accidental * * * * * * ' 9 Ann. Cas. 919. Here the cause of death was explained. There was no place for presumption; the case must be judged on the facts.

Burge v. Wabash R. Co. 244 Mo. 76, 95, 148 S. W. 925; Dwight v. Hazlett, 107 W. Va. 192, 147 S. E. 877, 66 A. L. R. 102; First Nat. Bank v. Tri-State Equipment & Repair Co. 108 W. Va. 686, 152 S. E. 635; Jones Comm. on Ev. (2d ed.) Section 32 on p. 62."

This presumption, however, is not evidence and does not change the burden of proof. Travelers' Ins. Co. v. Wilkes, 76 F. (2d) 701; Jefferson Standard Life Ins. Co. v. Clemmer, 79 F. (2d) 724; McDaniel v. Metropolitan Life Ins. Co., 195 S. E. (W. Va.) 597 (599). The West Virginia Court, in citing with approval and quoting from New York Life Ins. Co. v. Gamer, 303 U. S. 161, 82 L. ed. 726, said:

> "Courts have frequently remarked that presumptions are only intended to take the place of facts, and cannot be relied upon where the facts are shown; or that no presumption can stand in the face of facts. According to such authorities a presumption is an artificial thing, a mere house of cards, which one moment stands with sufficient force to determine an issue, but at the next, by reason of the slightest rebutting evidence, topples utterly out of consideration of the trier of facts."

Applying these rules of law, we now come to a consideration of their application to the facts in these cases. We have seen that the burden was upon the petitioner to show the condition precedent to liability—that the insured met his death from accident. But petitioner produced direct evidence of suicide. Thereby she toppled "utterly out of consideration" any presumption of accidental death and relieved the respondents of the "slightest rebutting" evidence. In other words, the presumption of accidental death is not present in this record, for the reason that petitioner's evidence consists of facts—the suicide note and the circumstances attendant thereto—which show death from suicide. There was no presumption of accident for respondents to rebut. Petitioner's evidence, involving the suicide note —

its significant wording, its background, to say nothing of respondent's evidence, as a part of that background which is in harmony with petitioner's evidence, negatives any presumption of accidental death, and none can be read into the record in these cases.

2. Since the evidence shows that the insured came to his death by suicide, it was the duty of the court to direct a verdict in favor of these respondents.

Petitioner in her brief argues that the Circuit Court of Appeals—its judgment and opinion—has denied trial by jury, has drawn its own inferences from the evidence contrary to the verdict of the jury and has substituted its own opinion of the evidence for the verdict of the jury. As stated above, upon the evidence it was the duty of the court to take these cases from the jury by directing verdicts in favor of respondents. In every law action where the controlling facts which appear from the evidence are such that a verdict adverse to such facts should be set aside, it is the duty of the court, as a matter of law, to direct a verdict in conformity to those facts. In such cases there is no denial of trial by jury or of substitution of the opinion of the court for the verdict of the jury. The jury are the triers of the facts, but where there are no facts in dispute or where the evidence plainly preponderates in favor of a party, it becomes the duty of the court to take the case from the jury by directing a verdict; and if the trial court fails to do so, the appellate court will correct his error.

We do not conceive this to be a question of local law. It is one of Federal practice and we do not deem it necessary to cite and quote from authorities in support of the proposition that under the Federal practice the appellate court will do what the Circuit Court did herein — reverse the District Court with direction to enter judgment in conformity to the law and the evidence. Rule 50, Rules of Civil Procedure.

Such is the law in West Virginia.

In White v. Hoster, 51 W. Va. 259 (dec. 1902), the court said:

> "The Circuit Court commits no reversible error in instructing a jury to find for a party in whose favor the evidence plainly and decidedly preponderates."

At page 261 the court uses this language:

> "There is no question but that if a verdict had been returned on the evidence, it would have been the duty of the court to set it aside, because opposed to the plain and decided preponderance of the evidence. Although the rule prevails in the United States courts and in a majority of state courts that in such a case a verdict should be directed when asked, it has not heretofore been adopted in this state. * * * The question is now presented whether this court should follow the development of the law slowly crystalizing around the majority rule, sustained as it is by reason or justice, or still cling to the antiquated theories of the minority rule through fear of invading the province of the jury. Shall the court in a plain case be compelled to sit still and permit a jury to bring in a verdict contrary to the plain and decided preponderance of the evidence, and then set it aside and be compelled to repeat the farce of a new trial? Or shall the court follow the settled practice of the courts of the United States and direct a verdict against the party in whose favor the evidence does not warrant a verdict. 'The practice is a wise one. It saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the province of the court and jury, and fixes where it belongs the responsibility which should be assumed by the court.' Merchants Nat. Bank v. State Nat. Bank, 10 Wall. 604; Schuyler v. Munson, 14 Wall. 442'."

In the recent case of Acree v. Eureka Pipe Line Co. 8 S. E. (2d) 186 (189), the West Virginia court said:

> "It is well settled in this state that where the evidence plainly and decidedly predominates in favor of a party, it is not error for a trial court in a law action to give a peremptory instruction in that party's favor. White v. Hoster, 51 W.Va. 259, 41 S. E. 180; Bank v. Lynch, 93 W. Va. 382, 388, 116 S. E. 685."

Again in Ashbaugh v. Railway Co. 72 W. Va. 765 (772):

> "It is the duty of the trial court, when the evidence of the plaintiff is insufficient to sustain a verdict in his favor, or when a verdict in his favor would be contrary to the law and the evidence, to direct a verdict in favor of the defendant, if requested so to do" (citing cases).

If the trial court fails to take the case from the jury, when the evidence preponderates in favor of a party and direct a verdict in conformity therewith, the appellate court will do so.

In Fuccy v. Ry. Co. 75 W. Va. 134, the Supreme Court of West Virginia, in reversing the trial court, said:

> "Notwithstanding sufficiency of the evidence to warrant instructions for both parties, the verdict should be set aside, if it is not sustained by evidence sufficient in law, or if it is contrary to the decided weight and preponderance of the evidence. Jaeger v. Ry. Co. 72 W. Va. 307."

See, Dexter, etc. v. Fuel Co. 90 W. Va. 465 (470); Owen v. Power Co. 78 W. Va. 596 (609).

In Marshall v. Conrad, 118 W. Va. 321 (327):

> "The evidence does not sustain the verdict. On writ of error, a verdict against the plain preponderance of the evidence should be set aside."

Counsel argue that the Circuit Court substituted its own opinion of the evidence for that of the jury and drew its own inferences from the evidence contrary to the verdict of the jury; and they cite and quote from numerous authorities in the premises. This argument and these authorities are not pertinent for the reason that they are applicable only in cases where there is a conflict in the testimony. Here the petitioner's case must be judged by her own evidence, and this evidence precludes recovery in her favor because it establishes suicide. Respondent's evidence merely supplements that of petitioner; it is not in conflict therewith.

We submit that the Writs of Certiorari prayed for by the petitioner should be denied.

Respectfully submitted,

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